No. 93-1631

IN THE

Supreme Court of the United States

OCTOBER TERM, 1994

LLOYD BENTSEN, SECRETARY OF THE TREASURY, *et al.*,

Petitioners,

v.

COORS BREWING COMPANY,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

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BRIEF AMICUS CURIAE OF THE WASHINGTON LEGAL FOUNDATION IN SUPPORT OF THE RESPONDENT

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BRIEF AMICUS CURIAE OF THE WASHINGTON LEGAL FOUNDATION IN SUPPORT OF THE RESPONDENT

INTEREST OF THE AMICUS CURIAE*

The Washington Legal Foundation ("WLF") is a non-profit public interest law and policy center with more than 100,000 members and supporters nationwide. While WLF engages in litigation and the administrative process in a variety of areas, WLF devotes a substantial portion of its resources to promoting commercial free speech rights. To that end, WLF has appeared

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* The letters of consent to the filing of this brief from counsel for the parties have been filed with the Clerk of this Court.

before this Court in cases dealing with free speech issues, including *City of Cincinnati v. Discovery Network, Inc.*, 113 S. Ct. 1550 (1993); *Peel v. Attorney Registration and Disciplinary Comm'n of Ill.*, 496 U.S. 91 (1990); *Pacific Gas & Electric Co. v. Public Utilities Comm'n of Calif.*, 475 U.S. 1 (1986); and *Consolidated Edison Co. v. Public Service Comm'n*, 447 U.S. 530 (1980).

SUMMARY OF ARGUMENT

This Court has recognized virtually plenary power in government to regulate conduct in an evenhanded way, where no fundamental right is implicated. At the same time it has put largely beyond the reach of government any measure to coerce—by mandate or prohibition—the minds, and thus the speech that reaches the minds, of adult persons. Speech may persuade, and persuasion may lead to conduct, but unless the speech portends an imminent danger of great harm the government may not for that reason stop the speaker's mouth or the listener's ears. *Brandenburg v. Ohio*, 395 U.S. 444, 447-48 (1969). Indeed, in a democracy it is only the second principle that makes the first tolerable. Commercial speech stands at the intersection of these two currents of decision: Promotional advertising, direct solicitation, and contractual offers are speech which is part of the conduct of business. The character of First Amendment protection afforded such speech reflects both the governmental authority to regulate the underlying business activity, and the Amendment's protection of the free flow of information.

In *Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council*, 425 U.S. 748, 769 (1976), the Court made clear that speech directed at conduct in the marketplace was not for that reason beyond the substantial protection of the First Amendment. The reason was clear: "[The] consumer's interest in the free flow of commercial information . . . may be as keen, if not keener by far, than his interest in the day's most urgent political debate." *Id.* at 763. Accord, *City of Cincinnati v. Discovery Network, Inc.*, 113 S. Ct. 1550, 1512 n.17 (1993).

To the extent, however, that regulation of commercial speech partook of regulation of the commerce itself, the Court has recognized that government may sometimes limit speech that proposes transactions that are harmful and thus might be seen as aspects of those transactions themselves. *Central Hudson Gas & Elec. Corp. v. Public Serv. Comm'n of New York*, 447 U.S. 557, 569-71 (1980) (recognizing principle but rejecting certain limitations on promotion of electricity as a fuel source). Similarly, commercial speech occurs in contexts where the law has traditionally protected against fraud, misrepresentation and oppression. Accordingly, since the criteria of truth and accuracy are more readily available in commercial than in, say, political contexts, the Court has permitted government considerable latitude in assuring that commercial communications neither lie, mislead, nor trick their audience by less than full and accurate statements. *Ibanez v. Florida Dep't of Business & Prof. Reg.*, 114 S. Ct. 2084, 2088 (1994)("Because disclosure of truthful, relevant information is more likely to make a positive contribution to decisonmaking than is concealment of such information, only false, deceptive, or misleading commercial speech may be banned.") (internal quotations and citation omitted).

Thus, the Court has recognized a limited power to restrict the forms of commercial speech relating to even wholly legal activities—to assure that it is not misleading or coercive, or even to render its commercial proposal less persuasive. But what the Court has never allowed, since first recognizing that commercial speech is after all speech and therefore protected by the First Amendment, is suppression of accurate, factual information on the ground that its dissemination will allegedly impair the achievement of governmental objectives. On the contrary, the Court has firmly adopted in the commercial context the more general First Amendment principle that government ends may not be advanced by the simple expedient of keeping people ignorant of basic factual information. *Virginia Board of Pharmacy*, 425 U.S. at 769. See *Linmark Associates, Inc. v. Willingboro*, 431 U.S. 85, 95-96 (1977) (city may not pursue laudable policy of

discouraging "white flight" by keeping its citizens in ignorance about when residential property is for sale or has been sold).

The four-part *Central Hudson* test states the balance the Court has struck between the interest in the free flow of commercial information and the government's interest to assure that such information relates to lawful subjects in a truthful and non-misleading way. Where, as in this case, the admitted purpose of the regulation is to keep consumers ignorant of pertinent factual information factually presented, *amicus* contends that there is no occasion to apply the *Central Hudson* analysis. Rather the more fundamental First Amendment analysis applies: When government seeks to silence statements on a lawful subject, statements that are neither false nor even misleading, because government believes that the public had better not know this information, then it must act for a compelling reason and its means must be strictly tailored to that exigent end. *E.g.*, *New York Times Co. v. United States*, 403 U.S. 713, 730-40 (1971) (White, J., concurring) (government failed to demonstrate authority for prior restraint notwithstanding laws punishing publication of classified secrets); *United States v. The Progressive, Inc.*, 467 F. Supp. 990 (W.D. Wis.)(granting order restraining publication of article describing how to manufacture a hydrogen bomb), *dism'd without opinion*, 610 F.2d 819 (7th Cir. 1979).

Amicus argues first that the regulation in this case does not even come close to meeting this stringent test. (Section I). *Amicus* argues next (Section II) against the United States' two assertions of an entitlement to deferential review of the provision in issue. Neither this Court's decision in *Posadas de Puerto Rico Assocs. v. Tourism Co. of Puerto Rico*, 478 U.S. 328 (1986), nor the argument that the United States is acting to facilitate state regulation of alcohol under the Twenty-first Amendment to the Constitution supports the conclusion that the Federal Alcohol Administration Act's ban on all label information as to alcohol content gets special deference because of the nature of product involved. Finally, *amicus* will also show (Section III), that for the same reason that this regulation fails the basic First Amendment test, it also fails the more permissive test proposed

by *Central Hudson*. As the Tenth Circuit properly held, the regulation does not "directly advance" a legitimate governmental interest. The concept of directness, if it is to have any determinate meaning, must take into account the unusual route the government seeks to travel here to achieve its goal. Nor, for analogous reasons, is there the appropriate degree of fit between the regulation and that goal. Indeed, the government's defense of the regulation comes close to admitting as much, since the government shows no more than a rational relation of the regulation to a legitimate interest—the most permissive test for governmental action, and one which is quite inappropriate to test prohibitions on the transmittal of information, even in a commercial context.

ARGUMENT

At issue in this case is whether Respondent Coors Brewing Company ("Coors") may include on the labels of its malt beverage products sold throughout the United States a simple, accurate statement of the alcohol content of the beverage. The Court of Appeals for Tenth Circuit concluded that the Federal Alcohol Administration Act ("FAAA") ban on "statements of . . . alcoholic content of malt beverages," 27 U.S.C. § 205(e)(2) (1988), applicable in those States where no law requires the listing of alcohol content information on product labels,[1] violates the First Amendment because it fails to satisfy the third prong of the test enunciated in *Central Hudson*, requiring that the restriction directly advance the governmental interest being promoted. Pet. App. at 7a-8a. *Amicus* agrees with this conclusion, but show first that the same result can also be reached by a more direct route.

The commercial speech at issue in this case provides only accurate and specific information about the contents of a beverage container. Moreover, Coors does not challenge here the federal

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[1] This information currently appears on Coors's products marketed in those States that require labeling to include a designation of alcohol content. Ten States require alcohol content information on certain types of malt beverage products. Pet. Br. at 11, n.10.

ban on using alcohol content information in promotional advertising.[2] Pet. App. at 4a-5a. The only rationale for the government's position is that, as the government has articulated, Pet. Br. at 35, the labeling restriction would "generally prevent consumers from knowing with certainty even that malt liquors, as a category, have higher alcohol content than other types of malt beverages," and would "prevent consumers from choosing among brands of *any* type of malt beverage . . . on the basis of their high alcohol content." In short, the government contends it will be better for people not to know the alcoholic content of the product they are contemplating buying or consuming. But "[i]t is precisely this kind of choice between the dangers of suppressing information, and the dangers of its misuse if it is freely available, that the First Amendment makes for us." *Virginia Board of Pharmacy*, 425 U.S. at 770.

I. THE FEDERAL EXCLUSION FROM MALT BEVERAGE LABELS OF ANY INFORMATION AS TO THE ALCOHOLIC CONTENT OF THE PRODUCT VIOLATES THE CARDINAL PRINCIPLE THAT GOVERNMENT SPEECH RESTRICTIONS MAY NOT BE JUSTIFIED ON THE GROUND THAT KEEPING PEOPLE IN IGNORANCE OF CERTAIN PURELY FACTUAL INFORMATION WILL HAVE BENEFICIAL EFFECTS.

The government in its brief asserts that there are two justifications for the labeling restriction at issue in this case—a desire to curb strength wars, and the facilitation of state regulation

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[2] Of course there are difficulties in identifying what constitutes advertising and promotion in contrast to the straightforward furnishing of an unvarnished fact here. But this case does not present a need to address that difficulty because the government explicitly acknowledges that its chosen means of regulation is keeping consumers ignorant, not protecting them from misleading or overly insistent importuning. The regulation of advertising may involve considerations analogous to those *amici* in support of Petitioners raise here, but the government has attempted no such more nuanced regulation and so the issue is not presented.

of alcohol. Pet. Br. at 20-22. Whatever one's assessment of the substantiality of these interests, or of the degree to which the alcohol labeling prohibition directly advances them in a narrowly tailored manner, it is entirely clear that they are advanced, if at all, by a chain of reasoning under which perceived harmful consequences are to be avoided by denying people basic factual information. By denying actual and potential consumers knowledge of this particular product characteristic, it is postulated, consumers and producers will be prevented from acting in a socially harmful way so as to increase the consumption of high alcohol malt beverages. The statute and regulation in question deny consumers that information by prohibiting its inclusion on the product label in any form.

A more effective way of keeping people in the dark can hardly be imagined. The prospective purchaser of such products has no plausible means of ascertaining this information in any way. In *Virginia Board of Pharmacy*, the prospective buyer of prescription drugs could ask the pharmacist his price, and thus price shop by a cumbersome word-of-mouth approach. In *Linmark Associates*, the seller of a house, denied his yard sign, could still advertise in the newspaper. But here, the purchaser of malt beverages has neither newspaper advertising nor the probability of an informed sales clerk to turn to, and the overall regulatory scheme seems well calculated to chill the speech of any knowledgeable promoter of the product who might be asked about its alcohol content.

"[I]n recent years this Court has not approved a blanket ban on commercial speech unless the expression itself was flawed in some way, either because it was deceptive or related to unlawful activity." *Central Hudson*, 447 U.S. at 566 n.9. Manifestly, the sale and consumption of malt beverages is not an unlawful activity. The federal government does not contend that the information about the alcohol content of malt beverages that

Coors seeks to include in its product labels is deceptive.[3] Pet. Br. at 20 n.16. Likewise, there is no issue here concerning governmental authority to restrict the form or medium by which a product is advertised or promoted. Coors does not challenge 27 C.F.R. § 7.29(f)(1993) (forbidding the use of the words "strong," "full strength," "extra strength," or similar words on labels) or 27 C.F.R. § 7.29(g) (forbidding the use of designs or devices "likely to be considered as statements of alcoholic content."). Coors dropped its challenge to the constitutionality of 27 U.S.C. § 205(f)(2), the federal ban on advertising the alcohol content of malt beverages, before the trial court ruled, and did not pursue the issue on appeal. See Pet. App. at 5a; Pet. App. at 34a-35a. Thus Coors is not now claiming to be able affirmatively to advertise or characterize the alcohol content in any particular way.

The fact that a government ban on access to factual information relates to a commercial product in no way ameliorates the harmful consequences of such suppression. Consumers have a variety of interests in obtaining information about the alcohol content of malt beverages. Some have health conditions that allow the consumption of alcohol in moderate amounts, for which

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[3] *Amicus* Center for Science in the Public Interest argues that alcohol content labeling involves "inherently misleading half-truths" because it "would deceptively make beer appear to be less intoxicating than wine and liquor when in fact beer is not" because an average serving is larger. CSPI Br. at 5. This remarkable argument, which does not appear in any way to contest the factual accuracy of a label's statement that the beverage contains a certain percentage of alcohol by volume, is simply another version of the unsound paternalistic notion that too much accurate information may be bad for people. In this case, the essential premise for that conclusion is that people will fail to realize that total alcohol consumed, and the intoxicating effect experienced, is a function not of the alcohol percentage alone, but of that together with the quantity consumed. In sum, *amicus* WLF responds to this argument with a question: how many people old enough to buy beer or wine do not know that there is a lot more liquid in a stein of beer than in a wine glass full of wine?

knowledge of the alcohol content of specific product is necessary. Individuals on diets may need to know the alcohol content to monitor their intake of calories. Some consumers dislike the taste of higher alcohol content malt beverages. For all of the above and similar consumers, statements of alcohol content provide necessary information akin to the labels found on most packaged food products that summarize the constituent elements of the product.

Amicus submits that the facts of this case present a stronger argument for treatment under a rule against pursuit of government goals by suppression of information than many of those in which the Court has most emphatically enunciated that principle. In *Virginia Board of Pharmacy*, the Court struck down a State statute making it unprofessional conduct for a pharmacist to advertise prescription drug prices. The State agency attempted to justify the restriction on the ground that it was necessary in order to prevent price cutting which might lower the professional quality of the pharmaceutical profession in the State. Notwithstanding the State's broad and unquestioned power to license and regulate professionals, see *Friedman v. Rogers*, 440 U.S. 1 (1979), *Williamson v. Lee Optical of Okla., Inc.*, 348 U.S. 483 (1955), the Court found the ban inconsistent with the core notion that government may not act to advance its interests, however substantial they may be, by relying on claimed beneficial effects of keeping people ignorant of basic facts.

In *Linmark Associates, Inc. v. Willingboro*, the Court struck down a town ordinance prohibiting real estate "For Sale" signs, which was enacted for the purpose of stemming white flight. Notwithstanding local government's recognized authority to regulate the time, place and manner of signs on private property, or the importance which the Court conceded to the goal of promoting stable and racially integrated housing, 431 U.S. at 94-95, the Court rejected the ban on the ground that the suppression of "the free flow of truthful information," because of its anticipated effects on the conduct of those learning of it, is constitutionally impermissible.

The present ban on labeling information concerning alcohol content, unlike the restrictions at issue in *Virginia Board of Pharmacy* and *Linmark Associates*, does not relate to advertising or solicitation, whose form and content the Court has sometimes allowed States to restrict. Instead, it is a complete prohibition of the package's alcoholic contents being included on the product label itself. As such, the FAAA's labeling restriction, quite unlike the advertising restrictions struck down in *Virginia Board of Pharmacy* and *Linmark Associates*, is an effort to foreclose all dissemination of the information at issue and to keep consumers ignorant. (It is as if Virginia had forbidden the pharmacist from quoting a price even at the time of the sale, so that the customer would only know what he had paid when he received his monthly bill or been handed his change after the transaction was completed.)

A disposition in this case based on the cardinal principle that government may not pursue its policy objectives by measures whose core purpose is to keep people unaware of certain relevant facts is wholly consistent with this Court's prior cases. Such a conclusion poses no hidden peril for federal or State regulatory schemes where the government restrictions on expression rest on a rationale more subtle than the simple proposition that it is better for people not to know certain things. Where speech relating to commercial products goes beyond a concededly accurate factual label statement of the package's contents, to embody advertising or promotional activities, issues other than the simple suppression of factual information become relevant, and the analysis, utilizing the four-part test of *Central Hudson*, necessarily becomes more complex.

Likewise, even with regard to labeling, government regulation of the form in which information is presented—in the cases of food labeling, 21 U.S.C. § 343 (1988 & Supp. V 1993),[4] drug

[4] Food labels generally must contain five items: (1) common or usual name and statement of identity, 21 U.S.C. § 343(g), 21 C.F.R. § 101.3(b) (1994); (2) quantity of contents, 21 U.S.C. § 343(e)(2), 21 C.F.R. § 101.105(a); (3) name and place of business of manufacturer, packer or distributor, 21 U.S.C. § 343(e)(1), 21 C.F.R. § 101.5(a); (4) ingredient information, 21 U.S.C. § 343(i) & (k), 21 C.F.R. § 101.22; and (5) nutritional information, 21 U.S.C. § 343(q), 58 Fed. Reg. 2079 (Jan. 6, 1993)(adopting new nutritional label standards that specify the format for the information). If the labels fail to meet these standards, the FDA can take regulatory action against the product as misbranded under 21 U.S.C. § 343(a).

labeling, 21 U.S.C. § 352 (1988 & Supp. V 1993),[5] and cosmetics labeling, 21 U.S.C. § 362(b) (Supp. V 1993),[6] for example—is based on concerns of clarity and consistency that justify imposing requirements as to the form or content of expression.[7] These sometimes detailed requirements are justified by a purpose to present consumers and others with information in

[5] Pursuant to 21 C.F.R. § 201.56(d)(1), the FDA specified eleven categories of information that must appear on prescription drug labels (to the extent each category is relevant to the drug). Specific labels for prescription drugs are determined by negotiations between the sponsor of the drug and the FDA after the FDA has approved the drug. 21 C.F.R. § 314.110(a). Labeling of drugs sold over the counter is regulated by a separate standard arising from the FDA's procedures for a formal review of "active ingredients" found in over the counter drugs. 21 C.F.R. § 330.1. In addition to content information, the labeling requirements include, for many drugs, required package inserts providing additional information and warnings. *E.g.*, 21 C.F.R. § 310.501 (oral contraceptives).

[6] The standards for labeling of cosmetics appear in 21 C.F.R. pt. 701.

[7] *Amicus* Center for Science in the Public Interest analogizes the regulation here to food labeling regulations that prohibit certain statements about calories per serving on the front label. Br. of CSPI at 19. Yet any such ban is acceptable only because the government requires that the nutritional information about calories appear on the back label in a specific format. 21 C.F.R. § 101.9(d)(5) & (12). In the case of food regulation, the government does not wholly suppress the information as it does in the case of alcohol content of malt beverages, but rather regulates the form and manner in which the information is conveyed.

an understandable form, to avoid confusion, and to prevent information deemed particularly pertinent from being overwhelmed by less urgent communications. Thus the thrust is always towards allowing better informed decisions. By contrast cases like this, involving an avowed and straightforward effort to deny people factual knowledge, have been rare. But that fact should not cause the Court to decide this case by a balance appropriate only where the government seeks to assure that speech on a lawful commercial subject is true and not in any way misleading. In this rare case, where the government seeks to justify a regulation of speech as necessary to prevent a general awareness of accurate, relevant factual information, the government must meet a far more stringent test: The end it pursues must be compelling, and this unusual and offensive means had better be narrowly tailored to serve it.

II. GOVERNMENT SUPPRESSION OF BASIC FACTUAL INFORMATION TO AVOID PERCEIVED CONSEQUENCES OF SUCH KNOWLEDGE CANNOT BE JUSTIFIED UNDER SOME PRESUMPTION OF VALIDITY INCIDENT TO GOVERNMENT REGULATION OF ALCOHOL OR OTHER "SOCIALLY HARMFUL" ACTIVITIES.

The government asks this Court to engraft on the law of commercial speech an exception for an ill-defined category of instances in which virtually entire deference is owed to government regulation of speech concerning alcohol or other "socially harmful" activities. Such a presumption would be directly at odds with the cardinal rule under the First Amendment that government may not generally advance its goals by banning communication of relevant, accurate factual information.

A. The government argues, Pet. Br. at 38, that this Court's decision in *Posadas de Puerto Rico*, gives rise "to 'an added presumption' of validity" because legislatures have a broader latitude to regulate speech that promotes socially harmful activities than they have to regulate other types of speech. This contention should be rejected as but one more effort to let the government's

outright suppression of basic factual information skate by through application of a deferential, "rational basis" standard.

Any notion of deference with regard to regulating the advertisement or promotion of particular activities which have been identified as socially harmful is inapplicable with regard to the kind of non-promotional information involved here. Nor does *Posadas*—which dealt with advertising efforts directed to Puerto Rico residents—amount to a total ban on dissemination of information concerning casino gambling establishments located there. Unlike the ban in this case, which all but forecloses consumer receipt of basic information concerning a legal product, the restriction in *Posadas* left numerous ways for residents to become aware of the on-going gambling activities. 478 U.S. at 335-36, 343 (quoting the Puerto Rico court's narrowing construction of law, which notes that the statute does not ban casino advertising directed at tourists that may nonetheless incidentally reach Puerto Rico residents).

More fundamentally, the recognition the government seeks for a presumptive right to suppress basic factual information with regard to "socially harmful" activities would create a gaping hole in the protections afforded by the First Amendment. Such a category would be inherently formless. In its brief, the government points to four areas of "socially harmful" activity: cigarettes, alcohol, brothels, and gambling and lotteries. Pet. Br. at 39. It offers no test to define the boundaries of such a category, apparently believing the subject matter at issue in this case, alcohol, falls easily within it.[8] Such foggy thinking merely highlights the unworkability of any such rule.

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[8] In *United States v. Edge Broadcasting Co.*, 113 S. Ct. 2696 (1993), the government suggested this Court should abandon the *Central Hudson* test for commercial speech about activities normally considered to be "vices." The Court ignored the suggestion then, 113 S. Ct. at 2703, and should continue to reject the government's idea, now renamed "socially harmful" activities.

The government offers as the talisman for inclusion in the "socially harmful" category the recognition that the government could ban the activity, so that a lesser regulation of banning commercial speech about the activity is permitted. Pet. Br. at 38-41. See *Posadas*, 478 U.S. at 346 ("it is precisely *because* the government could have enacted a wholesale prohibition of the underlying conduct that it is permissible for the government to take the less intrusive step of allowing the conduct, but reducing the demand through restrictions on advertising"). But on inspection this proves to be no test at all. Since the demise of *Lochner v. New York*, 198 U.S. 45 (1905), government has been free to regulate to the point of banning outright *any* activity not protected as a fundamental right: that may include smoking, the consumption of alcohol, but also the consumption of foods high in cholesterol, the keeping of pets and travel by private vehicle unless accompanied by two or more passengers, all of whom must wear seat belts. Now it is to the highest degree implausible to argue that because government is constitutionally entitled to ban all of these behaviors, it may also ban all speech, including factual and completely accurate non-promotional labeling, by those who sell goods and services related to them.

To be sure, this Court has always considered and judged for itself the urgency of an asserted governmental interest, as it does the balancing that various of its doctrines enjoin upon it. The *Central Hudson* test requires such balancing in the last three of its four prongs. But because liberty of expression is also in the balance in commercial speech cases, the Court must judge for itself the weight of the asserted government interest. To give preemptive weight to any government policy because it might constitutionally have justified outright prohibition of conduct would deprive this Court of just the exercise of judgment upon government restrictions that free speech doctrine assigns to it.

B. Equally unavailing is the government's argument that its regulation here is merely an effort by the federal government to assist State regulations and policies relating to alcoholic beverages. The government relies on this Court's decision in *United States v. Edge Broadcasting Co.*, 113 S. Ct. 2696 (1993),

as an instance of federal speech regulation aimed at accommodating State interests, and argues further that the Twenty-first Amendment entitles the FAAA to special deference. In both respects, the government's contentions should be rejected.

i. This case is far different from *United States v. Edge Broadcasting Co.* The field of broadcasting, the area at issue in *Edge Broadcasting*, is one where "the Congress has greater latitude to regulate . . . than other forms of communication." 113 S. Ct. at 2702. Further, the fit between the federal provision's allowance or prohibition of particular expression and the State policy being accommodated is much closer in *Edge* than in this case. The provisions at issue in *Edge Broadcasting* prohibited speech about lotteries except when the State had permitted the underlying activity. By comparison, the FAAA prevents dissemination of purely factual information even though the product may be legally bought and consumed in the particular State. Unlike the provisions challenged in *Edge Broadcasting*, the FAAA makes a federal choice in favor of no labelling unless a State chooses otherwise. The federal law does not represent deference to State decisions—it imposes a decision unless the State acts.

Thus, Congress's choice to ban lottery ads on stations that were located in anti-lottery States directly served the congressional policy of respecting the anti-lottery State's choice to forbid lotteries. 113 S. Ct. at 2704.[9] And the regulations at issue in *Edge Broadcasting* did not prevent factual news reporting about the existence of lotteries in Virginia; they restricted only promotional advertising. 113 S. Ct. at 2702. The statutory provisions therefore did not promote ignorance of lotteries; rather

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[9] The fact that signals from stations in the pro-lottery State could still reach the citizens of the anti-lottery State did not make the fit between the federal policy and its regulations unreasonable. *Id.* at 2705 (analogizing to the reasonableness test for time, place, and manner restrictions on non-commercial First Amendment speech).

they simply forbade one form of promotional advertising likely to reach residents of anti-lottery States. 113 S. Ct. at 2707.

ii. With regard to the Twenty-first Amendment, to begin with, it seems one hundred and eighty degrees wrong to invoke that Amendment to increase federal power in the area of liquor commerce so as to justify regulation so burdensome that the regulation could not otherwise stand. The Twenty-first Amendment does no more than enhance *State* power over commerce in liquor; the federal government does not receive increased power from the Twenty-first Amendment.[10]

Moreover, the Amendment does not allow the State, by virtue of regulatory power over liquor commerce, to override other provisions in the Constitution that restrict State power. *Department of Revenue v. James B. Beam Distilling Co.*, 377 U.S. 341, 344-46 (1964)(Twenty-first Amendment did not "permit what the Export-Import Clause precisely and expressly forbids."). If the Twenty-first Amendment has no effect on the Export-Import Clause, which concededly relates to power to tax commerce, it can hardly be surprising that the Amendment has no effect on other provisions of the Constitution, such as the First Amendment.

> Once passing beyond consideration of the Commerce Clause, the relevance of the Twenty-first Amendment to other constitutional provisions becomes increasingly doubtful. . . . "Neither the text nor the history of the Twenty-first Amendment suggests that it qualifies individual rights protected

[10] In addition to States, section 2 of the Twenty-first Amendment also refers to territories and possessions. Yet this reference does not aid the government's defense of the FAAA because the Act's effects are not limited to federally-controlled territories or possessions. Nor does the Amendment increase federal power over liquor commerce in any sense, for Congress has always exercised plenary power over any form of commerce. At best the reference to territories and possessions should be read as a grant of similar protection to acts by the legislature of the territory or possession regulating liquor commerce.

> by the Bill of Rights and the Fourteenth Amendment where the sale or use of liquor is concerned."

Craig v. Boren, 429 U.S. 190, 206 (1976) (quoting P. Brest, *Process of Constitutional Decisionmaking, Cases and Materials* 258 (1975)) (Court rejects suggestion that the Twenty-first Amendment can override the Equal Protection Clause of the Fourteenth Amendment).

But more fundamentally, the government relentlessly begs the question by assuming what needs to be proven: whether the First Amendment allows *any* level of government to regulate this subject through the dubious and unusual means of requiring information to be kept from the public. The few cases addressing the relationship between the Twenty-first Amendment and the First Amendment do not support any broad view that the Twenty-first Amendment provides States with additional authority to overcome the strictures of the First Amendment. These cases uphold State laws banning certain behavior in places where liquor is sold. In *California v. LaRue*, 409 U.S. 109 (1972), the Court noted that the Twenty-first Amendment increased State power over liquor licensing. Yet the central theme of the *LaRue* decision was that the State had articulated a sufficient concern about allowing liquor consumption in places where nude dancing occurs. Because conduct, even if intended to express ideas, may be more closely regulated by government, *id*. at 117, the State's prohibition of nude dancing in places licensed to sell liquor did not facially violate the First Amendment.[11] *Id*. at 118 (noting that the statute did not involve an across the board ban on nude dancing). The FAAA directly prohibits speech, not conduct. As such, it is not entitled to the more deferential review accorded in *LaRue*. Instead, the challenged FAAA provision must be tested

[11] Since *LaRue*, the Court has twice upheld similar State prohibitions of nude conduct in liquor establishments by summary disposition. *New York State Liquor Auth. v. Bellanca*, 452 U.S. 714 (1981)(per curiam); *City of Newport, Ky. v. Iacobucci*, 479 U.S. 92 (1986)(per curiam).

against the traditional analysis applied to bans on speech. Under that test, the FAAA does not survive scrutiny.

III. THE FAAA'S ALCOHOL CONTENT LABELING PROHIBITION FAILS UNDER THE *CENTRAL HUDSON* TEST.

In *Central Hudson* the Court formalized its basic determination to place commercial speech firmly under the aegis of the First Amendment, while acknowledging the special concern to assure that such speech not further illicit ends and that it be truthful and not misleading. The interest the government seeks to further must be "substantial." But the Court appreciated that government (and government brief writers)[12] are rarely at a loss to show that what they want to do has that kind of urgency behind it. For that reason the Court went on to say that "we must determine whether the regulation directly advances the governmental interest asserted." *Central Hudson*, 447 U.S. at 566. That is, the government must bear the burden of proof in demonstrating "that the harms it recites are real and that its restriction will in fact alleviate them to a material degree." *Edenfield v. Fane*, 113 S. Ct. 1792, 1800 (1993), *quoted with approval in Ibanez*, 114 S. Ct. at 2089.[13] The Court further required, as a fourth prong,

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[12] See *Kassel v. Consolidated Freightways*, 450 U.S. 662, 680 (1981) (Brennan, J. concurring).

[13] The nature of the burden of proof on the government in justifying a particular prohibition of commercial speech is illustrated by this Court's recent decision in *Ibanez*. There, Florida wanted to punish Ibanez, an attorney, for including factual statements about her CPA and CFP credentials on her business cards, on her stationary, and in her "yellow pages" ads. A significant focus of this Court's analysis was whether the statement of the CFP credential misled or potentially could mislead the public to assume that Ibanez was subject to state licensure requirements for that designation. 114 S. Ct. at 2089-92. Notwithstanding forceful arguments to the contrary at least with regard to the CFP credential, see 114 S. Ct. at 2092-94, (O'Connor, J., concurring in part and dissenting in part), the Court determined that the State failed to "back up its

that even such speech restrictions as directly advance the government's substantial interest not be "more extensive than necessary to serve the State's interest." *Central Hudson*, 447 U.S. at 569-70. The Court thereby recognized the natural tendency of government to blanket an area with regulation, when it has some justification for throwing a handkerchief over it, and the need to discipline that tendency when First Amendment liberties are at stake.

If this discipline the Court imposed is to do its work, then a court in assessing the government's showing that these requirements of directness and narrowness of fit have been met, must view those explanations with the rigor appropriate to its task of assuring that First Amendment liberties are not unnecessarily, routinely, or casually sacrificed. See *Discovery Network*, 113 S. Ct. at 1510 & n.13 ("if there are numerous and obvious less-burdensome alternatives to the restriction on commercial speech, that is certainly a relevant consideration in determining whether the 'fit' between ends and means is reasonable."). This is exactly the kind of inquiry the Tenth Circuit pursued in this case. Pet. App. at 6a-9a. If the court below had had the task of applying a rational basis test to ordinary economic regulation, the rigor with which it examined the government's showing would have been quite inappropriate, and the umbrage the government's brief takes at the close scrutiny the Tenth Circuit gave to its arguments would be justified. But this is not a simple case of economic regulation. First Amendment liberties are at stake. The court below did the job this Court set out for it in *Central Hudson*, and did it well. The government's showing in this case therefore fails the last two prongs of the *Central Hudson* test.

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alleged concern that the designation CFP would mislead rather than inform." 114 S. Ct. at 2091. In doing so, the Court stressed that "we cannot allow rote invocation of the words 'potentially misleading' to supplant the Board's burden to 'demonstrate that the harms it recites are real and that its restriction will in fact alleviate them to a material degree.' *Edenfield*, 507 U.S., at ___, 113 S. Ct. at 1800." *Ibanez*, 114 S. Ct. at 2090.

A. The FAAA Does Not Directly Advance The Government's Legitimate Interests.

"Directness," of course, is an evaluative concept, not one with an inflexible, objective empirical meaning. Cf. Robert E. Keeton, *Legal Cause in the Law* 5-9 (1963); Oliver W. Holmes, Jr., *The Common Law* 90-94 (1881); Guido Calabresi, *Concerning Cause and the Law of Torts*, 43 U. Chi L. Rev. 69 (1975). *Amicus* contends that the regulatory technique of requiring suppression of a true and non-misleading factual statement rarely if ever is the most direct means of achieving a proper regulatory purpose. The regulatory route that travels by way of stopping the mouth and closing the mind is peculiarly devious, for the reasons developed in the foregoing section. Rather than directing or prohibiting particular conduct by explicit commandment (*e.g.*, barring the manufacture of malt beverages with higher than a specified alcohol content), this approach seeks to discourage consumption of high alcohol beverages by keeping from people facts as to the content of what they are consuming. The underlying reasoning—that consumers cannot effectively select for a certain characteristic if information about that characteristic is successfully kept from them—is a convoluted means, at best, of achieving the ultimate objective. *Amicus* submits that this case offers an opportunity for the Court to give substance and definition to the "directness" test by holding that it forecloses outright suppression of factual information—the shaping of conduct through ignorance—as an alternative to more forthright means of advancing a particular interest.

This is not, however, an invitation that the Court must take up in order to strike down the regulation here. As the Tenth Circuit recognized, any connection between the label information and the threat of strength wars is tenuous at best, based on the showing made here. Pet. App. at 7a-9a. First, there was no evidence to demonstrate that strength wars exist in those States or foreign countries where alcohol content information must appear on the labels. Second, Coors demonstrated that market pressure for taste and lower calories undercut any impetus for strength wars. Third, the government's suggestion that Coors's request to include

the labeling information was a subterfuge for Coors's desire to demonstrate that its malt beverages do not contain less alcohol than competing brands, even if true, did not indicate that Coors's would engage in a strength war if allowed to inform the public of the alcohol content. Pet. App. at 7a-9a.

With regard to the government's central premise—that there is a risk of strength wars which the statute works directly to prevent—there are substantial reasons to be skeptical.[14] This justification relies heavily upon incidents from the immediate post-Prohibition era.[15] Much of the historical evidence of strength wars in that era related to advertising campaigns and promotional statements that stressed alcohol content. See Pet. App. at 16a (quoting from summary included in 1935 House Ways and Means Committee Hearings); Cf. Pet. App. at 35a-36a (distinguishing between label information and advertising). There is no reliable indication that the mere appearance of the alcohol content information on the labels, without more, caused strength wars.

Moreover, the inability of Coors to use the label information to promote its products—because it is not contesting the FAAA's prohibitions on either the advertising of alcohol content of malt beverages or the various restrictions on the use on the label of certain words relating to the product's alcoholic strength—severely undermines any effort to link the ban to the asserted interest in avoiding strength wars. So, too, have the changes in market conditions that have occurred during the past sixty years: growth of consumer interest in taste and low calories

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[14] Unlike the rational basis test for economic regulation, "the *Central Hudson* test does not permit [the courts] to supplant the precise interests put forward by the State with other suppositions." *Edenfield*, 113 S. Ct. at 1798.

[15] The consumer demand for strong alcohol was naturally heightened in the period immediately after the end of Prohibition. The continued validity of the suppositions arising from that era are highly doubtful.

that create market pressure against higher strength malt beverages.[16] As the Tenth Circuit correctly noted, there is no record evidence of strength wars in those States that require alcohol content labeling. Pet. App. at 8a.

The fact that the government requires alcohol content labeling on wine and other types of liquor also undercuts its rationale in this case.[17] If the information presents the risk of strength wars in malt beverages, why does the same information not present the risk of strength wars in wine, in bourbon, in vodka, in gin, in all other types of hard liquors. The government cannot expect this Court to take this justification seriously when faced with such a gaping hole in its logic.

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[16] The evidence of strength wars that the government addresses from the malt liquor market does not demonstrate that a strength war would begin in the broader malt beverage market. The customers for malt liquors concededly have a strong interest in higher alcoholic content, so it is more likely that their consumer preferences would focus on alcohol content. That supposition is not as readily transferrable to the broader malt beverage market. Moreover, it is not at all clear that the labeling ban has a notable effect in reducing the consumption of high alcohol malt liquors in those States where it is in effect, since consumers receive more generalized information about the alcohol content from the words "malt liquor" which legally appear on the label and in advertising.

[17] By federal regulation, alcohol content information must appear on the labels of distilled spirits and wines. 27 C.F.R. § 5.32(a)(3) & 5.37(a)(brand label for distilled spirits must include a statement of alcohol content), *id.* § 5.33(a)(labels must be affixed firmly to bottle); *id.* § 4.32(a)(1) & 4.36(a)(brand label for wine must state alcohol content for any wine containing greater than 14% alcohol by volume; if 14% or less, the label shall describe the alcohol content by using the term "table" wine ("light" wine) or shall state the alcohol content), *id.* § 4.38(e)(all labels shall be firmly affixed to containers of wine).

B. The FAAA Ban On Labeling Information Is More Extensive Than Necessary.

In applying the fourth prong of *Central Hudson*—and thus asking whether the FAAA regulation is more extensive than necessary—one must first determine the dimension of the regulation's extensiveness that is relevant. *Amicus* submits that the answer to that question must respond to the underlying concerns that *Central Hudson* addresses—the effect of the regulations on freedom of expression. Like the third prong's limitation based on directness, if this fourth prong is to be more than window-dressing, it must be used to inquire into other ways of achieving the stated objectives and comparing the effects on freedom of expression under each approach. *Discovery Network*, 113 S. Ct. at 1510 n.13 (endorsing comparison of government's regulation with less-burdensome alternatives to make the determination). It must not be a mere talisman imposing no substantial discipline at all on government regulation of speech, as the government's brief would have it.

Taking this approach, it is clear that the provision of the FAAA suppressing relevant, accurate alcohol content labeling in any form is more restrictive of free expression than a number of alternatives that might have been pursued. The government's regulatory purpose could be accomplished as well (indeed better) by directly specifying or setting a ceiling on the alcoholic content of specified beverages. Though this might be thought to be a more extensive regulation in so far as it impinges on the freedom of brewers to brew and drinkers to drink what they like, that is emphatically not the dimension relevant to an inquiry under the First Amendment. Such a regulation, however restrictive of freedom of economic conduct (a dimension in which, since the demise of *Lochner*, government has had almost unrestricted latitude), would leave the channels of communication entirely open and would not be at all restrictive of First Amendment values.

The response might be made that government is not politically in a position to impose such a restriction. But this is a response

that exposes the vice in the means that government has chosen. For what the government would be saying in effect is that it prefers to keep citizens ignorant, because these citizens would use ordinary democratic channels to defeat a more forthright method of accomplishing the same regulatory objective. But this is exactly why *Central Hudson* did not follow the post-*Lochner* path of total constitutional permissiveness. The intelligent choices of citizens are what protect the integrity of the market regulations imposed by government.

CONCLUSION

For the reasons set forth above, *amicus* submits that the decision of the court below should be affirmed.

Respectfully submitted,

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